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IN THE

Supreme Court of the United States

October Term, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Judgment of the District Court After First Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled proceeding having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury on April 7, 8, 9, 10, 13, 14, 15, 16, 1964, and the jury having rendered a verdict in favor of the plaintiff in the sum of $145,000.00 against the defendant, and also in favor of the third party defendant against the defendant, and the Court having granted defendant 20 days to file all motions and a new trial, it is

ADJUDGED that the plaintiff, Anthony Albanese have judgment against the defendant, N. V. Nederl. Amerik Stoomv. Maats., in the sum of $145,000.00, and it is further

ADJUDGED that the third party defendant, International Terminal Operating Co. Inc., having judgment against the defendant, N. V. Nerderl. Amerik Stoomv. Maats., dismissing the third party complaint.

Dated: New York, N.Y.
April 17, 1964.

/s/ James E. Valeche
Clerk.

Opinion of the Court of Appeals on First Appeal (346 F. 2d 481)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Argued Dec. 3, 1964 Revised Opinion June 15, 1965.)

No, 212, Docket 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

ROBERT KLONSKY, Brooklyn, N. Y. (Philip F. DiCostanzo, Brooklyn, on the brief), DICOSTANZO, KLONSKY & SERGI, Brooklyn, N. Y., *for plaintiff-appellee.*

Opinion of the Court of Appeals on First Appeal
(346 F. 2d 481)

EDMUND F. LAMB, New York City (Purdy, Lamb & Catoggio, William E. Fay III, New York City, of counsel to Schaffner & Furey, New York City, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York City (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York City, on the brief), *for third-party defendant-appellee.*

Before:

FRIENDLY and SMITH,
Circuit Judges,

and BLUMENFELD,
*District Judge.**

SMITH, *Circuit Judge.*

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

* Sitting by designation.

Opinion of the Court of Appeals on First Appeal
(346 F. 2d 481)

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a. m. to 10:45 a. m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a. m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a. m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a. m. and 11:05 a. m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to

prevent injury. This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in Berti v. Compagnie de Navigation, etc., 213 F.2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. Filipek v. Moore-McCormack Lines, Inc., 258 F.2d 734, 737, 2 Cir. 1958, cert. den. 359 U.S. 927, 79 S.Ct. 605, 3 L.Ed.2d 629. Contrast Halecki v. United New York and New Jersey Sandy Hook Pilots Association, 282 F.2d 137, 2 Cir. 1960; 302 F.2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the

vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, LaGuerra v. Brasileiro, 124 F.2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of § 9.2(b) and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and

clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. Nicroli v. Den Norske, 332 F.2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. Misurella v. Isthmian Lines, 328 F.2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. Misurella, supra. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 567, 78 S.Ct. 438, 2 L.Ed.2d 491. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

Memorandum of Decision on Motion for Summary Judgment

October 1, 1966

As I read the history of this litigation, particularly in the Court of Appeals and the Supreme Court, so much of the order of the Court of Appeals dated June 15, 1965 as remands the claim over to this court for a new trial remains in full force and effect. I do not agree with movant's contention here (see pages 3-4 of its brief) that the Court of Appeals ruled at 346 F. 2d 481, 484 that the shipowner may recover from the stevedore as a matter of law.

The motion for summary judgment is denied. It is so ordered.

H. R. Tyler, Jr.
U.S.D.J.

Jury's Answers to Special Interrogatories on the Re-trial

Special Interrogatories for the Jury

(Please answer the following questions. Unanimous agreement is necessary before an answer may be recorded.)

1. Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or mate at that time told Curko to proceed with the work in the #2 hatch?

Yes	No
√	

If your answer is "Yes," proceed to Question #2.

2. Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?

Yes	No
√	

(Illegible.)
Juror No. 1

Arthur Taub
Juror No. 2

(Illegible.)
Juror No. 4

Jury's Answers to Special Interrogatories on the Re-trial

William Larkin
Juror No. 3

(Illegible.)
Juror No. 5

Albert Holden, Jr.
Juror No. 9

Michael Katz
Juror No. 6

(Illegible.)
Juror No. 8

Albert F. Terri
Juror No. 10

James J. Corbett
Juror No. 7

James D. McLean
Juror No. 11

James E. Trapp
Juror No. 12

Judgment of the District Court on the Re-trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A judgment in favor of the plaintiff as against defendant/third party plaintiff having been previously entered herein, and the issues of the third party claim having been remanded to this Court, and the issues in the said third party claim having come on for retrial before the Honorable Richard H. Levet, United States District Judge and a jury on April 18, 19, 20, 21 and 24, 1967, and the attached interrogatories having been submitted to the jury, and the jury having answered the said interrogatories as indicated thereon, and the jury having returned a verdict in favor of the Third Party defendant as against the defendant/Third Party plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That the Third Party defendant International Terminal Operating Co., Inc., have judgment against the defendant/Third Party plaintiff N. V. Nederl. Amerik Stoomv. Maats., dismissing the third party complaint.

Dated: New York, N.Y.
May 3, 1967

/s/ John J. Olear, Jr.
Clerk.

APPROVED:

/s/ Richard H. Levet
U S D J

Opinion of District Judge Levet on Post Trial Motions
(279 F. Supp. 635)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ 1086

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Third-Party Plaintiff,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

Appearances:

PURDY, LAMB & CATOGGIO,
Of counsel to
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EDMUND F. LAMB,
Of Counsel.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

ALEXANDER, ASH & SCHWARTZ
Attorneys for Third-Party Defendant
76 Beaver Street
New York, N. Y.
JOSEPH ARTHUR COHEN,
Of Counsel.

LEVET, *D.J.*

After a verdict by the jury in favor of the third-party defendant, International Terminal Operating Co., Inc. ("ITO"), the third-party plaintiff, N. V. Nederl, Amerik Stoomv. Maats. ("Holland America Line"), has moved to set said verdict aside and for judgment in favor of Holland America Line nothwithstanding the verdict, or, in the alternative, for a new trial.

This claim arises by reason of the fact that the plaintiff, Anthony Albanese, a longshoreman, obtained a verdict and collected a judgment against Holland America Line for the sum of $145,000 by reason of injuries from carbon monoxide fumes while working in his occupation in the hold of the M.S. Schiedyk, owned by Holland America Line. This judgment, with interest and costs, was satisfied for $160,497.33 by Holland America Line.

TRIAL AND APPEALS

This case was originally tried before Judge Cooper with a jury and verdicts returned for Albanese against Holland America Line as defendant and against Holland America Line as third-party plaintiff in favor of ITO as third-party defendant. Holland America Line appealed both verdicts and the Court of Appeals reversed both, 346 F. 2d 481 (2nd

Cir. 1965). Albanese, ITO and Holland America Line all applied for certiorari. In a per curiam opinion, the Supreme Court accepted certiorari and reversed the Court of Appeals decision as to Albanese, but denied the petitions for certiorari by ITO and Holland America Line, 382 U.S. 283 (1965). It denied the petition for a rehearing on the Albanese decision, 382 U.S. 1000 (1966), and denied rehearing on the denial of ITO's petition for certiorari, 382 U.S. 1030 (1966). It also denied ITO's motion for leave to file a second petition for a rehearing, 384 U.S. 994 (1966). The Court of Appeals, however, thereafter refused to withdraw its mandate for a new trial between Holland America Line and ITO.

It is appropriate to point out that the jury verdict on this retrial was in accord with previous determinations.

1. At the first trial, Judge Cooper denied a motion for a directed verdict against ITO (SM 926, first trial);[1]

2. The jury's verdict at the first trial before Judge Cooper was in favor of ITO;

3. Judge Cooper denied a motion of Holland America Line for judgment N.O.V. against ITO;

4. The Court of Appeals of this circuit rejected the argument of Holland America Line that it was entitled to a verdict against ITO as a matter of law, 346 F. 2d 481;

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[1] Numbers in parenthesis, not otherwise identified, refer to pages in the stenographer's minutes of the second trial.

5. The United States Supreme Court denied the cross-petition of Holland America Line for certiorari seeking the same relief, 382 U.S. 283;

6. After reinstatement of the Albanese verdict by the Supreme Court, 382 U.S. 283, Holland America Line argued to the Court of Appeals for the Second Circuit that it was entitled to a judgment as a matter of law; the motion was denied on March 1, 1966;

7. Undaunted, on September 28, 1966, Holland America Line moved for summary judgment before Judge Tyler of the District Court. Judge Tyler denied the motion.

As a result, the claim of Holland America Line against ITO came on for retrial and was heard by court and jury. A verdict for ITO resulted.

THE RETRIAL

At the retrial the jury was instructed to answer "Special Interrogatories" which were as follows:

"SPECIAL INTERROGATORIES FOR THE JURY

(Please answer the following questions. Unanimous agreement is necessary before an answer may be recorded.)

1. Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or

mate at that time told Curko to proceed with the work in the #2 hatch.

....
Yes No

If your answer is "Yes," proceed to Question #2.

2. Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?

....
Yes No"

Counsel for Holland America Line made no objections. (296-98) The jurors were also directed to return a general verdict for plaintiff or for defendant.[2] (398) The jury eventually gave affirmative answers to both questions in the Special Interrogatories. The general verdict was for defendant.

The jury retired to deliberate at 2:58 P.M. (414) At about 4:45 the jury sent in a question reading: "What was the purpose of the special interrogatories as to the jury?" (415) The court instructed the jury:

(a) "These are asked merely for informational purposes to assist the Court."

(b) "These are not the only issues for your consideration; there may be others."

(c) And the court again instructed the jury that a general verdict was also required (416).

[2] The amount was stipulated by the parties.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

After further discussion with counsel about the special Interrogatories (417-18), the court recalled the jurors and instructed them as follows:

> "As the result of certain considerations by the Court of your question, I have decided to tell you this: In the event that you should—I don't say either way on this—if you should come to a determination that there is no breach of the warranty of workmanship and so forth as I explained to you the basic issue was, you find there is no breach, then you need not determine these other questions. If you find, however, that there is a breach, you may determine the interrogatories, the questions which I submitted. I hope that is clear to you. If it isn't write a note to me, Mr. Foreman. You may retire." (418)

At 5:30 P.M. on Friday, April 21, 1967, there being no verdict, I dismissed the jury for the day, with appropriate instructions, and directed the jurors to return for further deliberations on Monday, April 24, 1967. (419) Through certain circumstances, which I narrated to counsel on the 24th and which are delineated in the record, the fact that the jury had already voted upon and signed the Special Interrogatories came to my attention. (420-21) Without telling counsel which way the jury had voted, I fully explained this situation, saying:

> "* * * None of us I believe recognize(d) that the jurors could have already answered the interrogatories and signed the interrogatories on Friday afternoon. For the present, gentlemen, I do not think it is necessary for me to tell you how they voted. As I see it,

that would become significant only if it later appears that the jury tells us that it is deadlocked. * * *

"Now, my idea is that we should leave it as it is, and if any such deadlock situation appears, I will consult with you as to what to do, and I can't think of any other reason in which revelation would be necessary or the lack of it in any way prejudicial. * * *" (421-22)

When the jury returned on April 24th for further deliberation, I reiterated my instructions to them in these words:

"I have asked you to come in [i.e., into the court room] this morning merely in order that I may augment and fill out what I said Friday with respect to the special interrogatories. I tell you now that you need not answer these special interrogatories if you find that the plaintiff has not sustained its burden with respect to a breach of the warranty of workmanlike performance and that the plaintiff as the result has sustained damages; that is, if those two items have not been proved. On the other hand, if you find that the plaintiff has sustained its burden as to these features, then you must go on and consider the affirmative defense and answer the interrogatories." (430)

With respect to the Special Interrogatories, I also stated:

"* * * I sealed the interrogatories and I have kept them in my chambers locked, without any further revelation of any kind. I return these to you, and I merely charge you that if you find that you do not

need, under my instructions, to turn these in, you may seal them in this envelope and return to the clerk when you make your general verdict.

* * *

"The foreman may initial the envelope."' (430-31)

At 11:35 A.M. the jury returned its general verdict for the defendant (431). Then the following proceedings took place:

"The Court: Did you find that the answers were or were not necessary?

"The Foreman: We answered them anyway, your Honor. We had answered them previously. I don't know if that was right, but we had.

"The Court: Well, I was in hopes you had decided whether or not certain things were true. Will the lawyers approach the bench at the side bar.

"(At the side bar.)

"(Discussion off the record.)

"(In open court.)

"The Court: We will ask the foreman to submit the special interrogatories to the clerk.

"Shall I poll the jury as to both the general verdict and the interrogatories?

"Mr. Lamb: I think so, your Honor.

"The Court: Mr. Cohen?

"Mr. Cohen: I don't request it, your Honor.

"The Court: Do you have any objection?

"Mr. Cohen: No, sir.

"The Court: Very well, poll the jury as to the general verdict.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

"The Clerk: Gentlemen of the jury, listen to your verdict as it stands recorded. You say you find a verdict for the defendant?

"(Jury polled and all jurors answered in the affirmative.)

"The Court: Will you also open the special interrogatories and poll the jury on those.

"The Clerk: Gentlemen of the jury, listen to your special interrogatories. Number 1, your verdict is yes. Number 2, yes.

"(Jury polled and all answered in the affirmative.)"

(431-33)

I.

The Effect of the Verdict

The general verdict having been for the defendant and the jury having found by the Special Interrogatories (1) that an officer told the hatch boss that he would turn on the ship's blower in the No. 2 hatch, and (2) that ITO reasonably relied on such promise, I must conclude, since defendant is thus entitled to the most favorable assumptions, that the jury determined (1) that there was no breach of warranty, and (2) that the affirmative defense by ITO was sustained.

II.

The Motion for Judgment N.O.V.

Holland America Line moves for judgment N.O.V. on the ground that the facts relied upon by ITO are insuffi-

cient for a defense as a matter of law. The general rule, however, is that whether a stevedore has breached its warranty of workmanlike performance and whether the shipowner's conduct precludes indemnity are primarily factual, not legal, questions. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358 (1962); Weyerhaeuser S.S. Co. v. Nacrema Operating Co., 355 U.S. 563, 567-68 (1958); Waterman S.S. Corp. v. David, 353 F. 2d 660, 666 (5th Cir. 1965), cert. denied, 384 U.S. 972 (1966); Parker v. United States, 223 F. Supp. 647, 650 (D. Ore. 1963).

It cannot be said as a matter of law that ITO breached its obligation to perform its work "with reasonable safety," Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 565 (1958), by continuing to work in the hold, when it had reasonable grounds to believe that the ship's ventilation system would be turned on imminently, at least until it appeared that this expectation would not be fulfilled. The verdict of the jury indicates that ITO did not rely on this expectation any longer than was reasonable and such a finding has support in the evidence.

The continuance of the work in pursuance of the orders of the Mate clearly constituted a sound ground for the jury's verdict. Thompson v. Trent Maritime Co., 353 F. 2d 632, 641 (3rd Cir. 1965); Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co., 311 F. 2d 663 (4th Cir. 1962); Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32 (3rd Cir. 1961), cert. denied, 369 U.S. 848 (1962); Cf. Delaney v. Towmotor Corp., 339 F. 2d 4, 7 (2nd Cir. 1964). In Thompson, supra, Ganey, Circuit Judge, wrote:

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"• • • It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work." Hagans v. Farrell Lines, Inc., 237 F. 2d 477 (C.A. 3, 1956); Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32 (C.A. 3, 1961); United States v. Harrison, 245 F. 2d 911 (C.A. 9, 1957). • • •" 353 F. 2d at 641.

Furthermore, the jury was clearly instructed that, to render a verdict for ITO on the ground that the conduct of Holland America Line precluded recovery, they would have to find that such conduct constituted more than merely concurrent fault, but that it prevented or seriously handicapped the stevedore in his ability to do a workmanlike job. The verdict indicates that they did so find as a matter of fact, and the evidence is sufficient to support this finding. In this regard, it is irrelevant that ITO had general control of the stevedoring operations or that it had other means of protecting the longshoremen, because the crucial element was time. ITO did take the protective measure of calling its men out of the hold, but it acted too late, and the cause of its delay was the conduct of Holland America Line's Mate. It was not unreasonable for the jury to find that the statements of the Mate temporarily convinced ITO that protective measures on its part were unnecessary, thus seriously hindering ITO in fulfilling its warranty, and that ITO acted with sufficient promptness when it became apparent that the Mate would not fulfill his promise.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

Such conduct may be profitably analyzed in terms of waiver or equitable estoppel. The ship's mate led the stevedores to believe that the ventilation would be turned on, intending that they should rely on that promise, and, in order to get the ship loaded quickly to the profit of the shipowner, requested or ordered the stevedores to continue working. As the Supreme Court has said:

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U.S. 578, 580 (1879).

In this case, as the jury specifically found, the Mate clearly induced the stevedores to continue working when the stevedores were prepared to leave the hold, the stevedores relied on the Mate's promise, and their reliance was reasonable. Under such circumstances, it would be inequitable to allow the shipowner to complain now that the stevedore complied with his request and relied on his promise.

None of the authorities cited by Holland America Line are appropriate. No basis for a directed verdict exists. The verdict is not contrary to law or to the evidence.

III.

The Motion for a New Trial

Regulation 9.93 of the Safety and Health Regulations was properly admitted. In Ray v. Compania Naviera Continental, 203 F. Supp. 206, 210 (D.Md. 1962), Judge Watkins stated:

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"• • • The pamphlet constitutes the 'Bible' of the stevedoring industry. Hence the court accepts section 9.25 as defining what is reasonably required in the trade. • • •"

Regulations are at least some evidence of what is good practice. Manning v. Road, 358 F. 2d 615, 618 (5th Cir. 1966); Reid v. Quebec Paper Sales & Transp. Co., 340 F. 2d 34, 35 (2nd Cir. 1965); Provenza v. American Export Lines, Inc., 324 F. 2d 660, 665-66 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964); Chevis v. Luckenbach Overseas Corp., 228 F. Supp. 642, 649, 651 (E.D. Tex. 1964); Gainar v. S.S. Longview Victory, 226 F. Supp. 912, 914-15 (E.D. Va. 1964), aff'd sub nom. Thornton v. Victory Carriers, Inc., 338 F. 2d 959 (4th Cir. 1964).

With respect to the regulations, the court charged in part:

"These regulations as between these parties—that is, between the ship and a stevedore, are not fully determinative. The mere failure of a ship to test or to turn on the blowers without doing more is not a defense to the stevedore." (375)

With reference to the complaint of Holland America Line as to the admission of statements of the hatch boss to an alleged officer or Mate of the ship, the court charged in part as follows:

"The burden, however, is on the defendant to show that these statements were made, and to show that they were made to an officer, and that the reliance on these statements was reasonably and materially af-

fected the ability of the stevedore to do a workmanlike job." (377)

The conversation was admissible. As pointed out in the discussion of the motion for judgment N.O.V., it is relevant to a valid defense. I must conclude that the jury believed that the person was an officer (see Special Interrogatory No. 1).

Holland America Line argues that it was error to admit the stevedoring contract into evidence. Without reaching the question of relevance, however, it has not shown that it has been prejudiced by the admission. With regard to this and other evidence, it claims that counsel for ITO misled the jury in his closing argument, but counsel for Holland America Line made no objection at that time and he had ample opportunity to rebut such arguments in his own subsequent closing statement.

Holland America Line urges that the court permitted the jury to bring in a verdict inconsistent with the evidence on the prior trial. Obviously, the effect of the first trial, as far as issues between these parties were concerned, was limited. In the charge I stated:

> "As the result of that verdict in favor of Albanese, the following issues may be deemed to have been settled:
>
> "(1) Albanese was injured by reason of carbon monoxide fumes in the lower hold of the No. 2 hatch;
>
> "(2) The source of these fumes was the hi-lo or some people call it the forklift machine used by International in the hold performing services in connection with the loading of the ship;

> "(3) The verdict therefore indicates that the jury concluded that the cause of injuries was the carbon monoxide produced by hi-los in the lower hold of the No. 2 hatch.
>
> "Of course, [the] hi-los concededly were those owned and operated by the defendant.
>
> "However, this verdict did not pass upon the issue of liability except as between Albanese and Holland-America. Nor did it pass upon the liability of International to Holland-America Line by reason of any possible breach of warranty of workmanlike performance, nor did it pass on any defense of International as against Holland-America Line." (379-380)

This was a new trial arising because of determinations on appeal as above stated. Aside from the limitations on issues as above stated, there was no reason to restrict the proof as to relevant issues in the indemnity claim. No testimony inconsistent with the basic determinations of the first trial was admitted.

Holland America Line also objects to various refusals to charge as requested, particularly with regard to the effect of the verdict at the first trial between Albanese and Holland America Line as defendant. As to this, it should be noted that the doctrine of collateral estoppel applies only to facts and issues necessary to a judgment and not to merely evidentiary facts. Restatement of Judgments § 68, comments o and p, at 309-12 (1942). There has been no showing that any of the facts which the court refused to charge were necessary to the judgment between Albanese and Holland America Line.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

The shipping company appears to argue that the mere fact that the injuries came to Albanese because of fumes from ITO thereby demands indemnity to Holland America Line and thus disregards the clear conclusion of the jury at retrial that ITO reasonably relied on the ship to operate the blowers to clear the hold.

On this particular issue, after placing the burden upon ITO to show conduct on the part of the shipowner which would relieve the stevedoring company of its duties under the warranty, I charged:

> "However, it is not enough on the part of the stevedore to show concurrent, that is, at the same time, or simultaneous fault. The conduct of the shipowner must be such as to prevent or seriously handicap the stevedore in its ability to do a workmanlike job." (376-77)

I find no reason to grant a new trial.
Both motions are denied.
So ordered.

Dated: New York, N.Y.
June 9, 1967.

RICHARD H. LEVET
United States District Judge

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 186—September Term, 1967.

(Argued November 27, 1967 Decided April 12, 1968.)

Docket No. 31702

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Respondent.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from judgment on jury verdict in favor of stevedore on shipowner's third party claim to recover amounts paid and incurred by shipowner for injury to longshoreman, in the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

Reversed with direction to enter judgment for shipowner.

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, New York, N. Y., on the brief), *for defendant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Sidney A. Schwartz, and Alexander, Ash & Schwartz, New York, N. Y., on the brief), *for third-party defendant-respondent.*

SMITH, *Circuit Judge*:

This is an appeal by Holland American Lines, a third party plaintiff shipowner from a judgment dismissing after jury verdict third party claim for indemnification by stevedore for amount paid in satisfaction of judgment on personal injury claim of longshoreman, in the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*. We find error in denial of a motion for judgment n.o.v. and reverse for entry of judgment for the shipowner.

One Albanese, a longshoreman employed by third party defendant International Terminal Operating Co., Inc., a stevedore, was injured by carbon monoxide inhalation while working in the lower hold of Holland American's ship. On trial in the United States District Court for the Southern District of New York, judgment entered in favor of Albanese against Holland American, and against Holland American on its claim over against I. T. O. This court reversed and remanded with respect both to the longshoreman's claim and the shipowner's third party claim. 346 F. 2d 481 (2 Cir.). The Supreme Court reversed reinstat-

ing the judgment in favor of the plaintiff Albanese because it held this court in error in holding the charge on negligence erroneous. 382 U. S. 283 (1965). On retrial of Holland American's third party claim against I. T. O., judgment was entered by the Court, Richard H. Levet, *Judge,* on a jury verdict in favor of I. T. O., dismissing Holland American's third party claim. Holland American appeals from the judgment and from the denial of its motions for summary judgment, judgment n.o.v., and for a new trial. We find error in the denial of the motion for judgment notwithstanding the verdict and reverse for entry of judgment in favor of Holland American against I. T. O.

The court on retrial considered that two questions were open, whether there was a breach of the warranty of workmanlike service and whether even though the stevedore's conduct breached the warranty it was nevertheless exonerated by the actions of the shipowner. On the evidence here and the opinions of this court and the Supreme Court on the earlier appeal, we think neither presented a jury question.

We had held in effect that the shipowner was not to be cast in negligence without actual notice of an unsafe condition, since he was not required actively to supervise the work of a competent stevedore hired to do the work. Citing *Gutierrez* v. *Waterman SS Corp.,* 373 U. S. 206 (1963), the Supreme Court reversed. We take this to mean that regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to keep the area a safe one in which to work. In the circumstances shown by the evidence here, the injury was caused by the unsafe and unseaworthy condition in the hold, failure to correct which under the ruling of the Supreme Court the jury could find to be negligence on the part of the ship-

owner as well as unseaworthiness. But whichever theory the jury adopted in the first trial here, the creation of the condition was the act of the stevedore and breached his warranty of workmanlike service.

Here the stevedore not only knew of the dangerous condition, fumes in the hold, but created it by adding the second hi-lo to the one already operating without using blowers. Whether evidence to contradict the absence of blowers testified to in the first trial should have been admitted is questionable. *Caputo* v. *U. S. Lines,* 311 F. 2d 413 (2 Cir.), cert. denied sub nom. *Imparato Stevedoring Corp.* v. *U. S. Lines Co.,* 374 U. S. 833 (1963). In any case, there was no evidence that they were in use at the time of Albanese's injury, but only testimony by Jerkovich in his deposition that they were present and working at some uncertain time that morning. Even if the jury credited this item from Jerkovich's deposition in spite of his other inconsistent statements and the great amount of testimony that I.T.O. never did have blowers aboard, it could not support a finding that they were in operation at the significant time. At best, I. T. O. had blowers available, and gas testing equipment available, used neither at the time of the injury, allowed conditions to become unsafe, and continued to work the men. As we said on the first appeal, when the ship's blowers were not turned on, the stevedore could either have stopped work or used its own blowers. It did neither and plainly breached its warranty of workmanlike service. *Mosley* v. *Cia Mar. Adra S.A.,* 362 F. 2d 118 (2 Cir.), cert. denied 385 U. S. 933 (1966). See also *Nicroli* v. *Den Norske Afrika, etc.,* 332 F. 2d 651 (2 Cir. 1964); *Misurella* v. *Isthmian Lines,* 328 F. 2d 40 (2 Cir. 1964); *DeGioia* v. *United States Lines Co.,* 304 F. 2d 421 (2 Cir. 1962).

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

The court denied the motion for directed verdict and the motion post trial for judgment n.o.v. in part because of the continuance of the work in pursuance of the orders of the mate, quoting Judge Ganey in *Thompson* v. *Trent Maritime Co.*, 353 F. 2d 632, 641 (3 Cir. 1965), "It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work." This ruling was consistent with the charge which allowed the jury to find for the defendant if the conversation with the ship's officer took place and the stevedore boss Curko reasonably relied on it. We think that this misconstrued the decision of this court on the first appeal in this case. We there recognized that the exact requirements for exoneration because of actions of the ship may not yet be fixed by the cases, but held that merely concurrent fault is not enough, and held, as we later reiterated in *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 (2 Cir. 1965) that a shipowner's conduct to exonerate the stevedore "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job." Citing *Misurella* v. *Isthmian Lines, supra,* we held erroneous an instruction that the request to the ship's officer was sufficient to absolve the stevedore, and pointed out that there was no evidence of active "hindrance" by the ship. We can find nothing added here that should change that determination. The evidence was therefore insufficient to go to the jury on the question of exoneration, and the shipowner was entitled to judgment notwithstanding the verdict.

This is as it should be, for the stevedore is in direct charge of the work and is best able to control it so as to avoid serious damage from unsafe conditions by either

shutting down the job until the conditions are corrected or using its own means to correct them, and under the decisions of the Supreme Court from *Ryan* v. *Pan-Atlantic SS Co.*, 350 U. S. 124 (1955) through *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964),[1] this is precisely what the stevedore has impliedly warranted to do.

The judgment is reversed and remanded to the district court with instructions to enter judgment in favor of the third party plaintiff against the third party defendant in the amount of $160,497.33 with interest from February 9, 1966 plus reasonable attorneys' fees incurred by the third party plaintiff in defense against the claim of Albanese, and costs.

MOORE, *Circuit Judge* (dissenting):

After reinstatement of the Albanese verdict by the Supreme Court, 382 U. S. 283 (1965), Holland America argued to this court that it was entitled to judgment against I. T. O. as a matter of law. That motion was denied on March 1, 1966, determining that there was an issue of fact to be resolved.

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[1] "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." 376 U. S. at 324.

"'The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.' *De Gioia* v. *United States Lines*, 304 F. 2d 421, 426 (C. A. 2d Cir.). And see *Ferrigno* v. *Ocean Transport Ltd.*, 309 F. 2d 445 (C. A. 2d Cir.)." 376 U. S. at 323, n. 10.

Specifically, Holland America had to prove on the retrial of the indemnity claim that its liability was proximately caused by a breach of warranty of workmanlike service on the part of I. T. O. From the evidence on the retrial, the jury could have found that I. T. O. did not breach its warranty or act unreasonably. The ship was equipped with a Cargocaire ventilation system that was admitted to be adequate for ventilation of the hold where the hi-los were operating, and the stevedore could certainly have been found to be justified in waiting a few minutes before ordering the men out in the expectation that the ship's blowers would be turned on.

I. T. O. would not be relieved of liability simply because it told a ship's officer to turn on the blowers. Instant case, 346 F. 2d at 484. See also *Mortensen* v. *A/S Glittre,* 348 F. 2d 383 (2d Cir. 1965). But I. T. O. should not be held liable merely because its machines were producing fumes, without regard to whether the ship had an adequate ventilation system that could be expected to be in operation. Since such a system existed, and since the jury has decided that it was reasonable for I. T. O. to rely momentarily on its being turned on, any failure on the part of I. T. O. to use its testing equipment or portable blowers is irrelevant. This is not to say that a jury verdict for Holland America was required by the evidence, but only that the jury's decision should not be disturbed. The entry of judgment notwithstanding the verdict (and the overruling of this court's prior determination that there was a triable issue on essentially the same facts as are before us now) is in my opinion an unjustified usurpation of the function of the jury.

Order of Court of Appeals Denying Rehearing of Second Appeal

31702

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL AMERIK STOOMV. MAATS.,

Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

Denied

/s/ Leonard P. Moore
/s/ J. Joseph Smith
/s/ Paul R. Hays

Circuit Judges

May 13, 1968

Order of Court of Appeals Denying Rehearing in Banc of Second Appeal

31702

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

May 13, 1968

Judgment of Court of Appeals on Second Appeal

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of April one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,

Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with instructions to enter judg-

ment in favor of the defendant and third-party plaintiff-appellant N. V. Nederl Amerik Stoomv. Maats. against the third-party defendant-appellee in accordance with the opinion of this Court, with costs to defendant and third-party plaintiff-appellant N. V. Nederl Amerik Stoomv. Maats.

A. Daniel Fusaro
Clerk

A true copy.
/s/A. Daniel Fusaro
Clerk

Judgment of District Court Following Second Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

An appeal having been taken by defendant and third party plaintiff, N. V. NEDERL AMERIK STOOMV. MAATS., to United States Court of Appeals for the Second Circuit from the judgment of this Court entered herein on the third day of May, 1967 in favor of third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., against the defendant and third party plaintiff, N. V. Nederl Amerik Stoomv. Maats., dismissing the third party complaint, and the United States Court of Appeals having rendered its mandate filed herein on the 16th day of May, 1968, reversing the aforesaid judgment of this Court and ordering, adjudging and decreeing that the action be and it is hereby remanded to this Court with instructions to enter judgment in favor of the defendant and third party plaintiff-appellant, N. V. Nederl Amerik Stoomv. Maats., against the third party defendant-appellee in accordance with the opinion of the United States Court of Appeals for the Second Circuit rendered on said appeal, with costs to defendant and third party plaintiff-appellant, N. V. Nederl Amerik Stoomv. Maats., and it appearing from the opinion of the United States Court of Appeals for the Second Circuit that the judgment appealed from is reversed and remanded to the District Court with instructions to enter judgment in favor of the third party plaintiff against the third party defendant in the amount of $160,497.33 with interest from

Judgment of District Court Following Second Appeal

February 9, 1966, plus reasonable attorneys' fees incurred by the third-party plaintiff in defense against the claim of Albanese, and interest on the aforesaid sum of $160,497.33 from February 9, 1966 having been computed to be in the amount of $21,827.63 it is,

ORDERED, ADJUDGED AND DECREED: That third-party plaintiff, N. V. Nederl Amerik Stoomv. Maats., have judgment against the third-party defendant, International Terminal Operating Co. Inc., in the amount of $182,324.96 plus reasonable attorneys' fees incurred by third-party plaintiff in defense against the claim of the plaintiff, Anthony Albanese, and costs.

Dated: New York, New York
May 28, 1968

/s/ Richard H. Levet,
U.S.D.J.

Judgment entered 5-29-68
/s/ John J. Olear, Jr.
Clerk.